BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

FILED
04/14/22
04:59 PM
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Application of TRUCONNECT COMMUNICATIONS, INC. (U4380C) to Have the California Public Utilities Commission Reimburse Earned And Unpaid Activation Fees And To Reinstitute A Portability Freeze	Proceeding Number A.21-04-008 (Decision Issued March 21, 2022)

TRUCONNECT COMMUNICATIONS, INC'S

APPLICATION FOR REHEARING OF DECISION 22-03-013

AND REQUEST FOR ORAL ARGUMENT

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April 14, 2022

I. INTRODUCTION

Pursuant to Rule 16.1 of the Commission's Rules of Practice and Procedure and Utilities Code section 1731, TruConnect Communications, Inc. (U-4380-C) (TruConnect) hereby submits this Application for Rehearing of Decision 22-03-013, issued March 21, 2022. That Decision dismissed TruConnect's Application 21-04-008, which sought relief from certain Commission policies on activation fees, and further sought a portability freeze.

II. BACKGROUND

On April 13, 2021, pursuant to Rules 2.1 and 3 *et seq.* of the Commission's Rules of Practice and Procedure, TruConnect filed an application that sought to bring to the Commission's attention evidence that current Commission practices with respect to two programs violate federal and state law. Specifically, the Application requested two types of relief: (1) that the Commission bring its LifeLine program into legal compliance by reimbursing earned-yet-unpaid activation fees, and (2) that the Commission re-institute a portability freeze policy consistent with the law.

On June 30, 2021, the assigned Administrative Law Judge (ALJ) held a telephonic prehearing conference to discuss the scoping issues and procedural matters. That day, she directed TruConnect to file a legal brief and supplemental information by August 11, 2021, focusing largely on why TruConnect did not choose to style its own request as a Petition for Modification under Rule 16.4. On August 10, 2021, TruConnect filed a legal brief and supplemental information in response to the June 2021 ruling.

The brief was candid and forthright. It argued that the ALJ knew full well that the deadline for Petitions for Modification for Commission decisions had long since passed, but that the plain language of the Commission's rules allow for parties to use the Application process to bring matters like this to the Commission's attention and seek relief. If the ALJ refused to consider the Application, the brief declared, TruConnect would have no mechanism for seeking relief.

Moreover, the brief reminded the ALJ accurately that the Commission has for decades allowed Applications like TruConnect's. It further argued that because the Commission has at one point issued a decision on just about every topic within its purview, too strict a reading of the Petition for Modification deadlines would render the Application process superfluous. In other words, either the Application route exists as an option for all regulated parties to request relief, or it does not. Nevertheless, the ALJ ruled against TruConnect and refused to consider the Application, and the Commission formally adopted her actions in Decision 22-03-013, of which TruConnect now seeks rehearing.

It should further be noted that the substance of TruConnect's Application was never reached and had merit. Especially given its recent history, the Commission should welcome parties bringing to its attention Commission policies that are out of legal compliance. Here, the law requires carriers to be reimbursed activation fees and for the Commission to institute a portability freeze. In other words, in addition to the procedure under which it was brought, the substance of the Application also was correct and meritorious.

III. GROUNDS FOR REHEARING

Utilities Code section 1757(a) requires a party to identify the grounds supporting an Application for Rehearing. TruConnect will show below that with Decision 22-03-013, the Commission has not proceeded in the manner required by law. *See* Utilities Code § 1757(a)(2). As indicated above, the Decision violates the law two ways. First, an agency that fails to follow its own "required procedures" has not proceeded in the manner required by law. *Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87, 99. The Commission's Rules of Practice and Procedure, which TruConnect followed exactly, clearly allow a party to seek relief using the Application process. Refusing to consider TruConnect's Application was legal error, and shoehorning TruConnect into the long-expired Petition for Modification realm pre-determined the outcome. Second, the Commission's policies on the activation-fee and portability-freeze issues are in violation of the law. By endorsing the non-compliant status quo, the Decision further is in violation of the law and the Constitution.

Pursuant to Rule 16.3, TruConnect requests oral argument on this Rehearing Application, if only to raise these significant communication issues before the new commissioners, none of which were serving when many of these issues were last considered. Oral argument will assist the Commission in resolving these matters.

IV. LEGAL ARGUMENTS

Decision 22-03-013 is in error and should be reheard because it ignored Commission rules that allow parties to seek the relief TruConnect did using the Application process, and because it ignored the state of non-compliance with respect to

two Commission policies.

A. Commission Precedent and Rules Allow Parties to Raise Issues Like This in Applications.

The Decision dismissed TruConnect's Application using an erroneous procedural technicality. It appears to have recharacterized TruConnect's Application as a Petition for Modification and then, in a conclusory one-sentence fashion, dismissed it. This was incorrect because regulated parties have an absolute right to use the Application process to seek relief. It is troubling to see this right ignored.

The plain language of the rules provides that parties may proceed in the manner TruConnect did. Rule 2.1 states that an Application is the document a party may file where it can specify the "relief sought." "Sought" is the past tense of "seek." Thus, Rule 2.1 plainly allows a party to seek relief from the status quo – whether that status quo is a policy, order, decision, or an interpretation or execution of either – or as here, a combination thereof. To state that at some point in the Commission's history it issued a decision on a topic is a truism. That statement applies to just about everything within the Commission's purview. Thus, denying an Application because it wasn't styled as a Petition for Modification could be used to deny disingenuously any Application based on Petition for Modification deadlines. This is inequitable and incorrect.

Moreover, the Application detailed how changes in federal and state law, and the staff's manner of applying commission decisions placed the Commission in recent noncompliance. Therefore, under the plain and straightforward language of Rule 2.1, a party could opt to file an Application. The Decision was wrong to dismiss it.

And TruConnect's solid legal basis based on the Commission's rules doesn't stop with Rule 2.1. Rule 3 also provides other, clear grounds for parties to use the Application route, and Rule 3 similarly requires the Commission to consider them on the merits. To wit, Rule 3.2 provides that using an Application for matters concerning "changes that would result in increased rates" is appropriate. TruConnect sought two types of relief: a portability freeze, and the proper assignment of activation fees. Both of those requests could result in changes to rates for ratepayers, and the references in the Application to this concept and rates in general were manifest. Since both of TruConnect's requests involved changes that could result in increased rates, TruConnect's Application is permissible, indeed possibly required, under Rule 3.

TruConnect's reading of the Rules is supported by Commission precedent. In the long history of the Commission, parties have used Applications – without protest from ALJs – to seek a wide variety of types of relief. *See, e.g., Re California Ass'n of Long Distance Tel. Companies* (Aug. 18, 1986) 86-08-057, 21 CPUC 2d 549 (telecom carriers seeking exemptions from the application of certain statutes). Ironically, in *Re Pac. Gas & Elec. Co.* (Nov. 22, 1983) D. 83-11-068, 13 CPUC 2d 274, the Commission even advised petitioners for modification that an Application was the best method for raising the issues they had placed in a petition for modification – the exact opposite of what occurred here. Indeed, given the long history of parties seeking relief like TruConnect did using the Application process, the Commission should rehear its Decision and explain why it has chosen to boot TruConnect on a technicality, because it appears to

have occurred due to continuing regulatory animus.[1]

TruConnect asks that the Commission treat this Application appropriately, and allow TruConnect a forum to raise the substantive constitutional, statutory, and regulatory issues that have developed since the original decisions issued almost a decade ago. To deny regulated parties this application right is tantamount to saying they can never raise such issues if a Commission decision has ever issued on a topic. In a state as complicated as California, with a regulator as busy as the PUC, just about every subject has been covered by a decision before. Denying TruConnect the ability to raise new facts and law through the Application process under the "should have used a Petition for Modification" thoery would set a precedent that could be used to deny just about every use of the Application process. It's improper.

B. The Proposed Decision Ignores, but the Commission Should Consider, the Important Substantive Issues that TruConnect Application Raised.

In 2016, the Legislature passed AB 2570 unanimously, and Governor Jerry Brown signed it into law. The bill added Section 878.5 to the Public Utilities Code and required the PUC to adopt a Portability Freeze policy. The Commission briefly put one in place, improving slightly some of the problems carriers had faced. Then, in July 2018, the

[1] Counsel must note that the tone the ALJ used in the prehearing conference was derisive and disrespectful, and jarring considering that the counsel for the Applicant was new, had noticed the Commission's noncompliance as part of a survey/audit of industry practices, and because Counsel's client was exercising its basic legal rights to petition its regulator for relief. Additionally, there has been much litigation recently between TruConnect and the Commission, for example two appellate writs in the past two years, along with many other proceedings. Given the totality of the circumstances, the odd refusal for the Commission to allow TruConnect to seek relief using the Application process – a right clearly afforded by the Commission's rules – is extraordinary and must be explained.

Commission, ignoring the clear legislative intent of AB 2570, oddly reversed course, and overturned the portability freeze. This has exacerbated the problems carriers face, and flies in the face of legislative intent. As those problems persist, and considering the plain language of AB 2570, it is accurate to state the PUC is in a state on non-compliance. The Application sought to bring this state of non-compliance to the current Commissioners' attention.

A portability freeze is further important because the lack thereof directly affects the viability of the LifeLine program. Many carriers have repeatedly reported issues with criminals signing up for LifeLine, using the phone for a few days, then changing carriers at will, incurring great costs. This contributes to instability and unpredictability in the LifeLine program, which violates 47 U.S.C. § 254(f), the federal LifeLine statutes requiring stability and predictability in state's LifeLine policies. It also hurts public perception.

A similar concept applies to activation fees. As the Application noted, carriers should be reimbursed for activation fees under the laws and policies in force when they accrued. Again, the federal Universal Service statute, 47 U.S.C. § 254(f), provides that states may adopt regulations "not inconsistent with the [FCC's] rules to preserve and advance universal service" that provide "specific, predictable, and sufficient mechanisms to support" universal service. A state regulation concerning wireless providers is preempted by this clause if it does not provide predictable support for universal service. *Virgin Mobile USA, L.P. v. Keen* (D. Kan. 2020) 447 F. Supp. 3d 1071. A state agency's substantive changes to a universal-service program made outside of the

rulemaking process are preempted. *See generally WWC Holding Co., Inc. v. Sopkin* (10th Cir. 2007) 488 F.3d 1262, 1276–1277 (acknowledging that "the text of Section 254(f) could lead to the conclusion that a rule-making proceeding is required for regulation of a state-created universal services program"). And in addition to federal law, Section 871.5(d) of the California Utilities Code provides: "The furnishing of lifeline telephone service is in the public interest and should be supported fairly and equitably by . . . the commission [which] should implement the program in a way that is equitable, nondiscriminatory, and without competitive consequences for the telecommunications industry in California." In sum, there can be no doubt that federal and state law requires the Commission to support the LifeLine program and to administer it sensibly.

The Commission's actions with respect to activation fees, as outlined in the Application, were substantive, unpredictable changes made outside the rulemaking process. They arbitrarily denied carriers reimbursement for fees earned during periods where the policies allowed the same. Bizarrely, the Commission interprets the law to require paying such fees to wireline but not wireless providers. There is no good reason to pay these fees to wireline but not wireless providers. Under any metric, these actions violate federal and state law, because they forbid carriers from recovering lawful fees and fail to advance Lifeline service predictably.

Moreover, constitutional concerns are implicated where a state agency arbitrarily forbids a telecommunications carrier from recovering fees that were previously recoverable. *See CTIA–The Wireless Association v. Kentucky 911 Services Board* (E.D. Ky., Mar. 30, 2021) 2021 WL 1214500, at *10. Here, the complained-of prior policies of non-

reimbursement for activation fees and many aspects of California's current policies for reimbursements in general to Lifeline carriers are regulatory takings. The Fifth Amendment provides that private property may not be taken for public use without just compensation. U.S. Const. Amend. V. The Supreme Court has long held that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Regulatory taking claims do not require a physical occupation or appropriation of property by the government. *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002). Courts examine regulatory taking claims under the multifactor test set forth in *Penn Central. Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

Carriers have a property interest in the sums deployed to provide Lifeline service to eligible subscribers. California's current policies, and the ones complained of in the Application negate the economic value of these sums by requiring carriers to provide services to eligible customers, which are then not reimbursed. This significantly interferes with carriers' reasonable investment-backed expectations that they will receive reimbursement for all eligible Lifeline customers served. This approach operates as a compelled contract, obligating carriers to provide Lifeline service to certain subscribers for free – clearly a taking. These issues should be considered. The Commission's extant policies on activation-fees constitute a regulatory taking, and therefore, in addition to violating the law, also violate the Constitution. *See* Utilities Code § 1757(a)(6).

V. CONCLUSION

For the reasons discussed above, Decision 22-03-013 should be reheard.

Respectfully submitted on April 14, 2022,

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